UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DIANNA L. TRIPP,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 93-96-P-DMC***
	)	
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, et al.,	)	
	)	
Defendants	)	

MEMORANDUM DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT [1]

In this action, removed from state court, the plaintiff, widow and personal representative of the estate of Thomas Tripp (``Tripp''), seeks (i) a declaratory judgment that an accidental death policy issued by defendant American Bankers Insurance Company of Florida (``American Bankers'') provides benefits in the circumstances of Tripp's death and (ii) an order directing that policy coverage be paid to party-in-interest United States Department of Housing and Urban Development (``HUD'') in satisfaction of the mortgage balance owing on the plaintiff's residence in Thomaston, Maine. Before the court now are cross-motions for summary judgment.

[1] Pursuant to 28 U.S.C. 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

I. SUMMARY JUDGMENT STANDARDS

Pursuant to Fed. R. Civ. P. 56(c), the court shall grant summary judgment if there remains ``no genuine issue as to any material fact" and if ``the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the facts in the light most favorable to the nonmoving party and ``give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). ``Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.*; Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is ``material" if it may affect the outcome of the case; a dispute is ``genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. FACTUAL CONTEXT

The essential facts may be summarized as follows. In August 1992 American Bankers issued an accidental death credit life policy (No. 207221370) insuring Tripp in the amount of $61,000 in the event of loss of life due to an injury. HUD, mortgagee of the plaintiff's Thomaston, Maine residence, is the sole beneficiary of the policy. HUD's mortgage has a principal balance which is less than the policy limit. The policy was in full force and effect when Tripp died on September 19, 1992 as a result of injuries sustained while he was hang gliding.

At the time of the accident, Tripp was operating a ``Seagull III" model hang glider in a large privately-owned open pasture known as Harjula's Field. Like any hang glider, the Seagull III was capable of being controlled by its operator, of turning left and right during flight, of ascending and descending while in flight and of performing certain other maneuvers. To launch the glider, Tripp

had tied one end of a rope measuring approximately 200 feet in length to the control bar of the glider frame and the other end to his pick-up truck which was being driven by one Ed Moss. In his second attempt at hang gliding that day, Tripp, strapped to the glider, ran behind the truck while Moss drove the truck, initially at a speed of approximately 6 to 8 miles per hour. Tripp became airborne within seconds, the truck speed increased and Tripp and the glider rose to the full extension of the rope. Moss then stopped the truck, but before Tripp released the rope, as was the plan, the glider pitched forward in a nose dive, descended rapidly and crashed about 300 feet from where it had taken off, causing Tripp to sustain the injuries from which he died.

After the accident the plaintiff made a timely demand for payment of death benefits under the American Bankers' policy. That policy, however, included the following exclusion:

> Exclusions: This insurance does not cover any loss caused in whole or in part, directly or indirectly, from:
> . . .
> 3. an air travel accident, unless a fare-paying passenger or acting as a crew member of a regularly scheduled commercial passenger airline flight . . . .

By letter dated November 23, 1992 American Bankers denied the plaintiff's claim based on the ``air travel accident'' exclusion.

III. LEGAL ANALYSIS

Set rules of construction govern a court's interpretation of an insurance policy under Maine law.[2] An exclusionary clause is to be given effect only if it unambiguously and unequivocally negates coverage. *Gross v. Green Mountain Ins. Co.*, 506 A.2d 1139, 1141 (Me. 1986). If the language of the insurance policy is ambiguous, a court must construe the policy liberally in favor of the insured. *Allstate Ins. Co. v. Elwell*, 513 A.2d 269, 271 (Me. 1986). The language of an exclusionary clause is ambiguous if an ordinary person in the shoes of the insured would not understand that the policy did not cover claims such as the one now presented. *Id*. In other words, an ambiguity exists when the language of the exclusionary clause is fairly susceptible to two different but reasonable interpretations. *Peerless Ins. Co. v. Brennon*, 564 A.2d 383, 384 (Me. 1989). The determination whether an insurance contract is ambiguous is a question of law for the court to resolve. *Id*. Where no ambiguity exists, however, the terms of an exclusionary clause are to be interpreted according to their plain and commonly accepted meaning. *Id*.; *Limberis v. Aetna Cas. & Sur. Co.*, 263 A.2d 83, 86 (Me. 1970); *Johnson v. American Auto. Ins. Co.*, 131 Me. 288, 292 (Me. 1932). To ascertain an exclusionary clause's meaning, the language used should be viewed from the standpoint of the ordinarily intelligent person who is untrained in the law or insurance matters. *Baybutt Const. Corp. v. Commercial Union Ins. Co.*, 455 A.2d 914, 921 (Me. 1983), *overruled on other grounds, Peerless Ins. Co. v. Brennon*, 564 A.2d 383 (Me. 1989).

Notwithstanding the rule of liberal construction in favor of the insured, a court must enforce an unambiguous exclusionary clause according to its plain and ordinary meaning, even though such a construction may result in a determination unfavorable to the insured. *See Patrons Oxford Mut. Ins. Co. v. Marois*, 573 A.2d 16, 19 (Me. 1990); 2 *Couch on Insurance 2d* 15:17, at 190-91 (rev. ed. 1984). As with all contracts, the function of a court interpreting an insurance policy is to

[2] The parties have argued their respective positions according to Maine law. Maine law is properly applied to this case. *See, e.g., McAllaster v. Bruton*, 655 F. Supp 1371, 1373 (D. Me. 1987); *Restatement (Second) of Conflict of Laws*, 192 (1971).

ascertain the meaning and intention of the contract actually made, not to make a new contract. *Limberis*, 263 A.2d at 86. The terms of an insurance policy cannot be diminished or enlarged by judicial construction. *Id*. Absent any ambiguity, therefore, the rule of liberal construction does not apply, and the exclusionary clause must be enforced according to the parties' intentions as expressed in the written policy. *See, e.g., Johnson*, 131 Me. at 292. The construction of unambiguous language in an insurance policy is a matter of law for the court. *Banker's Life Ins. Co. of Neb. v. Eaton*, 430 A.2d 833, 834 (Me. 1981).

Neither party has claimed that the phrase ``air travel accident" is ambiguous. The only question presented is whether that phrase, in its plain and ordinary sense, encompasses the activity Tripp was engaged in at the time of his death. Giving the words ``air travel" the meaning that a person of ordinary intelligence would attach to them, I conclude that the exclusion covers the hang gliding activities that resulted in Tripp's death.

Courts faced with a similar question have determined that a hang glider constitutes an ``aircraft," as that word is commonly understood. *See, e.g., Fielder v. Farmers New World Life Ins. Co.*, 435 F. Supp. 912, 914 (C.D. Cal. 1977); *Totten v. New York Life Ins. Co.*, 696 P.2d 1082, 1087 (Or. 1985); *Totten v. New York Life Ins. Co.*, 680 P.2d 1021, 1023 (Or. App. 1984), *aff'd*, 696 P.2d 1082 (1985); *see also Fireman's Fund Am. Life Ins. Co. v. Long*, 251 S.E.2d 133, 134 (Ga. Ct. App. 1978) (hang glider is ``vehicle or devise for aerial navigation"); *cf. Wilson v. Insurance Co. of N. America*, 453 F. Supp. 732, 735 (N.D. Cal. 1978) (hang kite is ``aircraft"); *Deschler v. Fireman's Fund Am. Life Ins. Co.*, 663 P.2d 97, 99 (Utah 1983) (.W.2d 652, 654 (Tx. Ct. App. 1980) (para-plane is ``device for aerial navigation"). Indeed, Webster's dictionary defines ``aircraft" as any weight-carrying machine or structure, including kites and gliders, designed for flight in the air. *Webster's Third New International Dictionary* 46 (1981) (``a weight-carrying machine or structure for flight in or navigation of the air that is designed to be supported by the air either by the buoyancy of the structure or by the dynamic action of the air against its surfaces -- used of airplanes, balloons, helicopters, kites, kite balloons, orthopters and gliders but chiefly of airplanes or

aerostats.").[3] A hang glider, consistent with Webster's definition of ``aircraft," is a device designed to carry a person in flight through the air. *See Fielder*, 435 F. Supp. at 913-14; *Totten*, 680 P.2d at 1023; Affidavit of Brad Kushner (Exh. 3 of Docket No. 17).

Because I find that a hang glider is a type of aircraft, I am hard pressed to find that its use does not constitute ``air travel." At the very least, air travel, given its plain and ordinary meaning, involves some form of flight through the air. Gliding through the air at an altitude of 200 feet, much like a bird, in a device designed to allow one to fly, undoubtedly qualifies as air travel. Indeed, if Tripp's actions in this case do not amount to air travel, I cannot say what does. After all, the risk the insurer sought to avoid by this air travel exclusion -- the likelihood of death resulting from any mishap occurring during noncommercial flight -- is the same whether the person is flying in an airplane, a helicopter, a hot air balloon or a hang glider. *See Totten*, 680 P.2d at 1023. In fact, the risk of accidental death is presumably greater when, as here, the insured attempts nonmechanized flight. A person of ordinary intelligence purchasing this policy would have realized, upon reading it, that he or she would be taking an uninsured risk by ascending into the air in a hang glider. *See id*.

Contrary to the plaintiff's assertions, it makes no difference to this inquiry that Tripp was still fastened to the truck at the time of his accident. *See Deschler*, 663 P.2d at 98-99. The glider was tethered to the truck so that it could be launched into flight. Once Tripp went aloft, flight had commenced, and he was engaged in air travel. Indeed, Tripp reached an elevation of roughly 200 feet before crashing to earth. It would be arbitrary and somewhat irrational to say that he was not then engaged in air travel simply because he had yet to release the launch tether. *Cf. Green v. Mutual Ben. Life Ins. Co.*, 144 F.2d 55, 57-58 (1st Cir. 1944) (death from drowning following crash landing of airplane was a result of ``aerial flight"); *Rossman v. Metropolitan Life Ins. Co.*, 71 F. Supp. 592, 594-95 (D. Me. 1947) (death from drowning following crash landing of airplane was ``direct or indirect result of flight"). Consequently, I find that Tripp's death was the result of an ``air travel accident."

[3] A hang glider is itself defined as ``a kitelike glider." *Webster's Third New International Dictionary* at 75a.

IV. CONCLUSION

For the foregoing reasons, the plaintiff's motion for summary judgment is ***DENIED*** and defendant American Bankers' motion for summary judgment is ***GRANTED***.

Dated at Portland, Maine this 10th day of February, 1994.

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David M. Cohen

United States Magistrate Judge